

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MARILEA R. MITCHELL,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Thomas J. Wynne

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUMMARY OF ARGUMENT

For the first three years of his life, S.A. (DOB 10/22/2005) alternatively lived with either his biological mother or a family friend. 12/17/07 RP 19; 12/18/07 RP 280; Ex. 59 at 25. In December 2005, S.A. moved in with Danny Abegg, S.A.'s biological father, and petitioner Marilea R. Mitchell. 12/17/07 RP 20; 12/18/07 RP 280. On March 7, 2007, police went to the home of Ms. Mitchell and Mr. Abegg to check on S.A.'s welfare. 12/18/07 RP 229. S.A. was in bed, smelling of urine, emaciated, and unable to stand on his own. 12/18/07 RP 234-36. S.A. was taken to a hospital and diagnosed with severe malnutrition. 12/17/07 RP 51, 137, 171-72.

Ms. Mitchell was charged with criminal mistreatment in the first degree,<sup>1</sup> committed by failure to provide food to S.A. while she was "a person who has assumed the responsibility to provide a dependent person the basic necessities of life." For purposes of the criminal mistreatment statute, a "dependent person" is defined as "a person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life," whereas a "child" is defined as "a person under eighteen years of age." Although the

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<sup>1</sup>Danny Abegg was also convicted of criminal mistreatment in the first degree. Snohomish County Superior Court No. 07-1-00855-6.

term "disability" was never used at trial, Ms. Mitchell was convicted as charged nonetheless.

The use of different separately defined terms in the same statute, the use of the disjunctive "or," and the omission of a duty of care to a child from the charged alternative means of committing the offense demonstrate that the Legislature intended the terms "child" and "dependent person" to refer to two separate and mutually exclusive categories of persons. Because S.A. was a child and not a dependent person, there was no evidence that Ms. Mitchell failed to provide for a "dependent person." This Court must reverse Ms. Mitchell's conviction for criminal mistreatment in the first degree and dismiss the charge.

B. ISSUE PRESENTED

The due process provisions of the federal and state constitutions require the State to prove beyond a reasonable doubt every essential element of the crime charged. Ms. Mitchell was convicted of criminal mistreatment in the first degree, committed for failing to provide the basic necessities of life to "a dependent person" for whom she had assumed responsibility. The criminal mistreatment statute imposes a duty of care on four categories of caregivers; three categories of caregivers owe a duty of care to



either "a child or a dependent person" or "a child" only, and the fourth category, the category at issue here, owes a duty of care to "a dependent person" only. For purposes of the criminal mistreatment statute, a "dependent person" is defined as a person who has a mental or physical disability or is of extreme advanced age, whereas "a child" is a person under eighteen years of age. Where the evidence established that the victim was a child rather than a dependent person, was Ms. Mitchell's right to due process violated when she was convicted for criminal mistreatment in the first degree, as charged?

C. STATEMENT OF THE CASE

Ms. Mitchell was charged with criminal mistreatment in the first degree of four year old S.A., alleged to have been committed while she was "a person who has assumed the responsibility to provide to a dependent person the basic necessities of life," in violation of RCW 9A.42.020. CP 26-27. Following a bench trial, the court found Ms. Mitchell guilty as charged, despite the fact that S.A. was under eighteen years old and not disabled. CP 23, 52; 12/17/07 RP 4-7; 12/19/07 RP 417-19. Based on her offender score of "0", Ms. Mitchell faced a standard range of 31-41 months,

but the court sentenced her to an exceptional sentence of ninety-six months.<sup>2</sup> CP 6-18, 23-24.

Ms. Mitchell appealed and argued S.A. was not disabled and fell within the statutory definition of “child,” rather than “dependent person,” and, therefore, there was insufficient evidence to establish she assumed the responsibility to provide the basic necessities of life to a dependent person, an essential element of the crime charged. Br. of App. at 7-12. In a published opinion, the Court of Appeals disagreed and concluded the terms “child” and “dependent person” were not mutually exclusive, regardless of the rules of statutory construction, and stated, “We find nothing in the statute to indicate an intention that a victim must fall into only one category. The statute simply uses the two terms to obtain broad protection for persons who are vulnerable due to youth or dependency or both.” State v. Mitchell, 149 Wn. App. 716, 723, 205 P.3d 920 (2009).

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<sup>2</sup>Ms. Mitchell has remained incarcerated since March 2007 and, considering earned early release, she has served the top end of the standard range.

D. ARGUMENT

MS. MITCHELL'S CONVICTION FOR CRIMINAL MISTREATMENT IN THE FIRST DEGREE MUST BE REVERSED FOR INSUFFICIENT EVIDENCE TO ESTABLISH SHE ASSUMED A DUTY OF CARE TO A "DEPENDENT PERSON," AS DEFINED IN RCW 9A.42.010.

1. Due process requires the State to prove beyond a reasonable doubt every element of the crime of criminal mistreatment in the first degree. The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3; Winship, 397 U.S. at 358; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S.

307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Salinas, 119 Wn.2d 192, 210, 829 P.2d 1068 (1992).

2. The terms "child" and "dependent person" are mutually exclusive for purposes of the criminal mistreatment statute.

a. The criminal mistreatment statute plainly delineates separate categories of persons who owe a duty to either "a child or dependent person," "a child" only, or "a dependent person" only. RCW 9A.42.020(1) imposes a duty of care on four categories of caregivers:

A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

The first category imposes a duty of care to "a child" only, the second and fourth categories impose a duty of care to "a child or a dependent person," while the third category, the category at issue here, imposes a duty of care to "a dependent person" only.

The terms "dependent person" and "child" are specifically defined for purposes of the criminal mistreatment statute.

"Dependent person" means a person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life. A resident of a nursing home, as defined in RCW 18.51.010, a resident of an adult family home, as defined in RCW 70.128.010, and a frail elder or vulnerable adult, as defined in RCW 74.34.020(13), is presumed to be a dependent person for purposes of this chapter.

RCW 9A.42.010(4).

"Child" means a person under eighteen years of age.

RCW 9A.42.010(3).

When interpreting a statute, courts first look to the "plain meaning" of the statutory language, as the clear expression of legislative intent. State Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); accord City of Seattle v. Winebrenner, 2009 WL 3465931, \*2 (Wash., October 29, 2009).

The Legislature's use of the separately defined terms, "child" and "dependent person" signifies the intent that the terms refer to

two separate and distinct categories of persons. This intent is manifested by the specific and exclusive definitions the Legislature has given these terms. "When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings." Densley v. Dep't of Retirement Sys., 162 Wn.2d 210, 219, 173 P.3d 885 (2007) (use of terms "active federal service in the military or naval forces" and "service in the armed forces" in same statute presumed to have different meanings); accord State v. Roggencamp, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005) (use of term "in a reckless manner" in vehicular homicide and vehicular assault statutes and use of term "reckless driving" in reckless driving statute indicates legislative intent for different meanings).

The Legislature's use of the disjunctive phrase "child or dependent person" further signifies the intent for separate and distinct categories. The term "or" does not mean "and." Childers v. Childers, 89 Wn.2d 592, 596, 575 P.2d 210 (1978). Where the term "or" appears in a statute, courts are to presume the Legislature intended the term be interpreted in its disjunctive sense, unless there is a clear legislative intent to the contrary. State v. Bolar, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996). For example,

in State v. Sigman, this Court interpreted RCW 69.53.010(1) which makes it unlawful for a property owner to knowingly “rent, lease, or make available for use” any building, room, space, or enclosure for an illegal purpose. 118 Wn.2d 442, 826 P.2d 144 (1992).

This Court stated:

The Court of Appeals erred in holding that “the term ‘make available’ be read only as contemplating an act similar to renting or leasing.” From that, the Court of Appeals concluded that defendant’s inaction was passive acquiescence and not criminalized. That reading of the statute ignores the disjunctive “or”. The statute is perfectly plain in declaring it unlawful to “knowingly rent, lease, *or* make available.” (Italic ours.) To reach the conclusion of the Court of Appeals one must ignore the disjunctive “or” and one must fail to read the statute as a whole. That is contrary to relevant rules of construction.

118 Wn.2d at 447-48.

Here, too, the Court of Appeals ignored the disjunctive “or,” and stated, “The statute simply uses the two terms to obtain broad protection for person who are vulnerable due to youth or dependency or both.” Opinion at 6 (emphasis added). Yet the phrase “or both” does not appear in the statute. A reviewing court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

By contrast, in the statement of intent at the beginning of RCW Chapter 9A.42, Criminal Mistreatment, the Legislature did include the phrase “or both” in reference to forms of abuse or neglect:

The legislature finds that there is a significant need to protect children and dependent persons, including frail elder and vulnerable adults, from abuse and neglect by their parents, by persons entrusted with their physical custody, or by persons employed to provide them with the basic necessities of life. The legislature further finds that such abuse and neglect often takes the forms of either withholding from them the basic necessities of life, including food, water, shelter, clothing, and health care, or abandoning them, or both. Therefore, it is the intent of the legislature that criminal penalties be imposed on those guilty of such abuse or neglect.

RCW 9A.42.005 (emphasis added).<sup>3</sup> The use of the phrase “or both” in the statement of intent and its omission from the criminal statute two sections later strongly confirms the conclusion that the Legislature intended the term “or” in its disjunctive sense.

Moreover, the doctrine of expressio unius est exclusio alterius provides that “[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were

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<sup>3</sup>Oddly, the statement of intent does not refer to “a person who has assumed the responsibility to provide a dependent person the basic necessities of life,” as charged in the present case.



intentionally omitted by the Legislature.” State v. Swanson, 116 Wn. App. 67, 76, 65 P.3d 343 (2003). “Omissions are deemed to be exclusions.” In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). Here, the omission of the term “child” from the category of caregiver sub judice, but the inclusion of the term “child” in all other categories of caregivers, underscores the Legislature’s intent to designate two separate and distinct categories of persons.

The related doctrine of ejusdem generis provides that when both specific and general words appear in a sequence, the specific words modify and limit the general words. Hughey v. United States, 495 U.S. 411, 419, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990); State v. Gonzales-Flores, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008). The definition of “dependent person” specifies several categories of persons presumed to be dependent: residents of a nursing home, residents of an adult family home, and frail elder or vulnerable adults. RCW 9A.42.010(4). These categories involve adults only, further underscoring the Legislature’s intent that the term “dependent person” refer to adults only, and not to children.

b. If the terms “child” and “dependent person” are ambiguous, the rule of lenity requires this Court to interpret the terms as referring to separate and mutually categories of persons. Assuming, arguendo, the statute is ambiguous as to whether a “child” can also be a “dependent person, the rule of lenity requires this Court to interpret the statute in favor of Ms. Mitchell. A statute is ambiguous when it is subject to more than one reasonable interpretation. Jacobs, 154 Wn.2d at 600-01. Where a statute is ambiguous, the rule of lenity requires the statute be interpreted in favor of the defendant. Id. at 601. Therefore, if the term “dependent person” is ambiguous on this point, the rule of lenity requires interpreting the term as limited to adults only.

c. The State did not prove Ms. Mitchell failed to provide for a dependent person. Following a bench trial, the court entered Finding of Fact 1:

That the defendant is guilty beyond a reasonable doubt of the crime of criminal mistreatment in the first degree as charged in the information.

CP 23 (emphasis added). The court also entered Conclusion of Law 2, which concluded, in pertinent part:

The defendant is guilty of the crime as charged in the information. . . .

CP 24 (emphasis added).

Yet the trial court did not find that S.A. was a “dependent person” or “disabled.” Rather, the court characterized S.A. only as a “four year old.” 12/19/07 RP 418. In fact, the term “disabled” was never used at trial or in the court’s findings. Therefore, the finding and conclusion are completely unsupported by the evidence.

d. Ms. Mitchell’s conviction must be reversed. In light of the lack of evidence to establish beyond a reasonable doubt Ms. Mitchell “assumed the responsibility to provide a dependent person the basic necessities of life,” as charged, her conviction for criminal mistreatment in the first degree cannot stand. A conviction based on insufficient evidence must be reversed. State v. Smith, 155 Wn.2d 496, 505, 120 P.3d 599 (2005). To retry Ms. Mitchell for the same conduct would violate the prohibition against double jeopardy. Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996), quoted with approval in State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).


Reversal is required.

E. CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the briefing below and the Petition for Review, Ms. Mitchell requests this Court reverse her conviction for criminal mistreatment in the first degree and remand for dismissal of the charge.

DATED this 4<sup>th</sup> day of December 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sarah M. Hrobsky', is written over a horizontal line.

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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

MARILEA MITCHELL,

Petitioner.

NO. 83169-6

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